

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BRIAN F. ROGERS,
Plaintiff,

v.

CITY OF SAN FRANCISCO, et al.,
Defendants.

Case No. 23-cv-04997-JCS

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S
COMPLAINT FOR FAILURE TO
STATE A CLAIM**

Re: Dkt. No. 19

I. INTRODUCTION

In this employment discrimination case, Plaintiff Brian Rogers has sued the City of San Francisco and the San Francisco Public Utilities Commission ("SFPUC") (collectively, the "City"), based on the SFPUC's failure to hire him for a Senior Account Clerk position based on his race. Defendants bring a motion to dismiss ("Motion"), asking the Court to dismiss Plaintiff's cause of action for intentional infliction of emotional distress ("IIED"), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the basis that Plaintiff failed to comply with the claim presentation requirements of the Government Claims Act and furthermore, that municipalities cannot be liable for common law torts. In the Motion, Defendants also ask the Court to strike Plaintiff's request for punitive damages under Rule 12(f) of the Federal Rules of Civil Procedure on the basis that municipalities are not liable for punitive damages.

In opposition to the Motion, Plaintiff has supplied two letters from the San Francisco City Attorneys' Office reflecting that a claim that Plaintiff submitted on September 22, 2023 based on an incident that occurred on March 8, 2023 was found to be untimely and that Plaintiff's subsequent request to file a late claim was denied. Plaintiff did not address Defendants' assertion that his request for punitive damages should be stricken in his Opposition brief.

The Court finds that the Motion is suitable for determination without oral argument and therefore vacates the motion hearing set for March 1, 2024 pursuant to Civ. L. R. 7-1(b). The Case Management Conference set for the same date will remain on calendar but will be conducted at 2:00 p.m. instead of 9:30 a.m. on that date. For the reasons set forth below, the Motion is GRANTED in part and DENIED in part.¹

II. BACKGROUND

In the Complaint, Plaintiff, “who is [a] [B]lack male[,]” alleges that he applied for a Senior Account Clerk position with SFPUC on December 3, 2022, responding to a job posting indicating that there were two openings for this position. Compl. ¶ 17. On January 26, 2023, Plaintiff was interviewed for the position at the SFPUC headquarters by Accounting Services Director Vivian Chen and two other individuals who did not identify themselves. *Id.* ¶ 19. Plaintiff alleges that he was highly qualified for the position but Defendants nevertheless hired two individuals who were far less qualified to fill the positions because those individuals were White and Asian. *Id.* ¶ 21. According to Plaintiff, “[t]he only reason that [he] was NOT hired for the position [was] strictly because of his race.” *Id.* ¶ 28.

Plaintiff alleges that Ms. Chen “gave no reasons” for declining to hire Plaintiff and neither she nor the other two individuals had any contact with Plaintiff after the January 26 interview. *Id.* ¶ 31. Plaintiff alleges in the Complaint that he filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) on June 28, 2023 and “waited for the SFPUC to conduct their own investigation” but that it “never performed the investigation.” *Id.* ¶¶ 32-33. He also alleges that SFPUC “has their own Equal Employment Opportunity department but they failed to investigate this matter.” *Id.* ¶ 33. According to Plaintiff, the SFPUC’s Equal Employment Opportunity department was “initially contacted” on March 8, 2023 and an employee of SFPUC told Plaintiff an investigation would take two months, but “they never even started on the investigation.” *Id.* ¶ 33. Plaintiff does not allege in his Complaint that he filed a claim with the City under the California Government Claims Act.

¹ The parties have consented to the jurisdiction of a United States magistrate judge pursuant to 28 U.S.C. § 636(c).

Plaintiff asserts five claims in his complaint: 1) violation of his Constitutional right to equal protection; 2) discrimination under Title VII of the Civil Rights Act of 1964; 3) discrimination under California’s Fair Employment and Housing Act (“FEHA”) on the basis of sex; 4) IIED; and 5) discrimination under FEHA based on race and national origin.² *Id.* ¶¶ 39-62. Plaintiff seeks compensatory and punitive damages, as well as “all employment benefits he would have enjoyed had he not been discriminated against[.]” *Id.* ¶¶ 67-74.

III. ANALYSIS

A. Whether IIED Claim Should be Dismissed

1. Legal Standards Under Rule 12(b)(6)

A complaint may be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim on which relief can be granted. “The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff’s burden at the pleading stage is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that a “pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

In ruling on a motion to dismiss under Rule 12(b)(6), the court analyzes the complaint and takes “all allegations of material fact as true and construe[s] them in the light most favorable to the non-moving party.” *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint must “contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation

² In the complaint, the second and third claims are both labelled “Second Cause of Action”; the IIED claim is labelled “Third Cause of Action” and is referred to as such by Defendants to avoid confusion.

of the elements of a cause of action will not do.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555). “[C]ourts ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (alteration in original). Rather, the claim must be “‘plausible on its face,’” meaning that the plaintiff must plead sufficient factual allegations to “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S. at 570).

2. Discussion

Under the California Government Claims Act, Cal. Gov’t Code §§ 810-996.6, a public entity is not liable for any injury, including common law torts, except as otherwise provided by statute. Cal. Gov’t Code § 815(a); *Milosky v. Regents of the Univ. of Cal.*, 44 Cal.4th 876, 900–01 (2008). However, a public entity may be found vicariously liable for an employees’ tortious acts taken within the scope of their employment, except where the employee is immune from liability. Cal. Gov’t Code § 815.2. A public employee is immune where the injury resulted from a discretionary act. Cal. Gov’t Code § 820.2.

Where immunity has been waived under the Government Claims Act, an individual seeking to assert a state law tort claim against a public entity must follow certain procedures before doing so. This includes submitting a written claim to the public entity at issue within six months of the date on which the cause of action accrued. Cal. Gov’t Code § 911.2. An individual may file a civil suit only after the governing body of the public entity acts upon the claim or rejects the claim. Cal. Gov’t Code § 945.4. An individual’s failure to meet these requirements bars them from bringing a civil action for the same claim in state or federal court. *Karim–Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 627 (9th Cir.1988) (holding that state law tort claims against public entities and public employees are barred unless the plaintiff pleads facts showing that they filed written claims with the public entity in accordance with the California Government Claims Act). Further, where “[a] cause of action . . . is subject to the statutory claim procedure[,]

[a plaintiff] must allege either that [they] complied with the claims presentation requirement, or that a recognized exception or excuse for noncompliance exists.” *Gong v. City of Rosemead*, 226 Cal. App. 4th 363, 374 (2014).

Here, Defendants argue that Plaintiff’s IIED claim fails because: 1) municipalities are immune from liability for common-law torts, including IIED; and 2) Plaintiff has not alleged in his Complaint that he timely submitted a claim under the Government Claims Act with the City before filing this action. The Court rejects Defendants’ first argument but agrees with the second one.

While municipalities are generally immune from liability for common-law torts under the Government Claims Act, they may be held vicariously liable for the torts of their employees where the employee caused an injury in the course and scope of their employment by a non-discretionary act, as discussed above. *See Randolph v. City of E. Palo Alto*, No. C 06-07476 SI, 2008 WL 618908, at *10 (N.D. Cal. Mar. 1, 2008). “Discretionary act immunity is ‘reserved for basic policy decisions which have been expressly committed to coordinate branches of government,’ ‘areas of quasi-legislative policy-making [which] are sufficiently sensitive’ to call for judicial abstention.” *Id.* (quoting *Caldwell v. Montoya*, 10 Cal.4th at 976) (quoting *Johnson v. California*, 69 Cal.2d 782, 794, (1968)). “In contrast, there is no immunity for ministerial decisions that ‘merely implement a basic policy already formulated.’ ” *Id.* (quoting *Caldwell v. Montoya*, 10 Cal.4th at 976). In *Randolph*, the court found that the hiring and supervision of police officers by the city was not a discretionary act under these principles and therefore, that the city was not immune from the plaintiff’s claim for negligent hiring, training and supervision. *Id.* at *11. Similarly, nothing in the current record suggests that the decision not to hire Plaintiff was the result of a “basic policy decision” as required to establish discretionary act immunity. The Court also notes that Defendants have not argued that the failure to hire Plaintiff was the result of any discretionary act. Therefore, the Court rejects Defendants’ first argument, namely, that they are immune from liability on the IIED claim because it is a common law claim.

On the other hand, Defendants are correct as to their second argument. Plaintiff does not allege in the Complaint that he timely presented a claim to the City; nor does he allege that any

1 recognized excuse for noncompliance exists. Therefore, he has not adequately alleged compliance
2 with the prerequisites of the Government Claims Act and his IIED claim fails to state a claim for
3 that reason.

4 **B. Whether Punitive Damages Should be Stricken**

5 Under California Government Code Section 818, “a public entity is not liable for
6 [exemplary damages] or other damages imposed primarily for the sake of example and by way of
7 punishing the defendant.” Defendants therefore seek to strike Plaintiffs’ request for punitive
8 damages (Compl. ¶¶ 58, 64, 71) pursuant to Rule 12(f) of the Federal Rules of Civil Procedure.
9 The Ninth Circuit has held, however, that “Rule 12(f) does not authorize district courts to strike
10 claims for damages on the ground that such claims are precluded as a matter of law.”
11 *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974–75 (9th Cir. 2010). Accordingly, the
12 Court DENIES the Motion as to Defendants’ request.

13 **C. Whether Plaintiff Should Be Granted Leave to Amend**

14 The remaining question is whether Plaintiff should be permitted to amend his complaint to
15 cure the defects in his allegations relating to compliance with the Government Claims Act.
16 Although leave to amend is freely granted, the Court may deny leave to amend where it finds that
17 amendment is futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Here, the Court concludes that
18 Plaintiff should be permitted to amend his complaint.

19 As a preliminary matter, the Court notes that the letters Plaintiff attached to his Opposition
20 brief do not establish that he presented a timely claim based on the conduct that is at issue in this
21 case. First, Plaintiff did not supply a copy of the underlying claim, making it impossible to
22 determine whether the claim referenced in the letters, based on an incident that occurred on March
23 8, 2023, involved the same conduct that is the basis for the IIED claim asserted in this case.
24 Second, the letters indicate that the claim Plaintiff submitted as to the March 8, 2023 incident was
25 submitted on September 22, 2023 -- more than six months after the incident date -- and was
26 therefore untimely. Third, the letters indicate Plaintiff’s application for leave to file a late claim
27 was denied.

28 Nonetheless, in light of Plaintiff’s pro se status, he will be given an opportunity to amend

his complaint to plead facts showing that he submitted a timely claim or that a recognized exception or excuse for noncompliance with the Government Claims Act exists.

IV. CONCLUSION

For the reasons stated above, the Motion is GRANTED in part and DENIED in part. The Court GRANTS the Motion as to Plaintiff's IIED claim, which is dismissed, without prejudice, for failure to state a claim. The Court DENIES the Motion as to Defendants' request that the Court strike Plaintiff's request for punitive damages. Plaintiff may file an amended complaint to address the deficiencies in his allegations with respect to his compliance with the Government Claims Act. Plaintiff's amended complaint shall be filed no later than **April 5, 2024**.

Plaintiff, who is not represented by counsel, is encouraged to consult with the Federal Pro Bono Project's Legal Help Center in either of the Oakland or San Francisco federal courthouses for assistance. The San Francisco Legal Help Center office is located in Room 2796 on the 15th floor at 450 Golden Gate Avenue, San Francisco, CA 94102. The Oakland office is located in Room 470 S on the 4th floor at 1301 Clay Street, Oakland, CA 94612. Appointments can be made by calling (415) 782-8982 or emailing federalprobonoproject@sfbay.org. Lawyers at the Legal Help Center can provide basic assistance to parties representing themselves but cannot provide legal representation.

IT IS SO ORDERED.

Dated: February 23, 2024



JOSEPH C. SPERO
United States Magistrate Judge